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the proper tribunal to consider them. Mr. Parsons, in his work on Contracts, after reviewing some of the cases, says: "A surety is discharged where the creditor, after notice and request, has been guilty of a delay which amounts to gross negligence, and by his negligence the surety has lost his security or indemnity." (Vol. 2, p. 25, 5th Ed.) How can a surety be said to have lost his security by the negligence of the creditor to sue, when by paying the debt himself, as was his duty to do, he could at any moment have instituted suit against the principal? In this case the omission of the creditor to sue a principal residing in another state could not, under any circumstances, as between him and the surety, make him chargeable with gross negligence. The motion for a new trial is refused.

United States District Court, Western District of Wisconsin.

MATTER OF W. S. STEVENS, BANKRUPT.¹

It is the duty of a court of bankruptcy to see that the property to which a bankrupt is entitled is secured to him, as much as to see that he surrenders the balance to his creditors.

Personal property exempt by the laws of the state where the bankrupt resides and where the petition is filed, will be protected wherever it may be actually situated.

Personal property of a debtor residing in Wisconsin was attached in Illinois. Pending the attachment the debtor filed a petition in bankruptcy in Wisconsin. The property was exempt by the laws of Wisconsin. *Held:*

1. That the property was exempt under the Bankrupt Act and the attachment dissolved.
2. The Bankruptcy Court will not consider whether the property was exempt under the laws of Illinois.
3. The officer in possession of the property under the attachment writ cannot retain the property until his fees are paid. His only remedy is by application to the court to be paid out of funds in the hands of the assignee.

THIS was a case of voluntary bankruptcy. The petition was filed September 30th 1870, and at the request of the bankrupt, a provisional assignee was appointed of his estate. A portion of the property at the time (a span of horses, wagon and harness)

¹ We are indebted to Josiah H. Bissell, official reporter, for the following opinion. Mr. Bissell's Reports (the first volume of which is now in press) comprise the decisions in the Circuit and District Courts within the 7th Judicial Circuit, since 6 McLean (1855) down to the present time.

was in the possession of a constable, in Winnebago county, Illinois, under and by virtue of attachments issued against the bankrupt, by a justice of the peace of the state of Illinois, in favor of divers creditors of the bankrupt residing in Wisconsin. The property thus held was claimed by the bankrupt, in his petition, as exempt under the Bankrupt Act. The attaching creditors now moved the court to modify the order appointing the provisional assignee, so as to exempt from the operation thereof the property attached and held in the state of Illinois.

C. A. Parsons, for bankrupt.

S. J. Todd, for creditors.

HOPKINS, D. J.—The ground of this motion is that by the laws of Illinois, the property was not exempt, and that by the attachments the creditors acquired a valid lien upon it as against the bankrupt; and further that as under the Bankrupt Act it would be exempt and would not pass to the assignee, the bankrupt was the only party who could contest the right to the property under the attachment; that the assignee has no right to take possession of it under the act, nor had the other creditors any right or interest in the question, for if released from the attachment it would be exempt under the Bankrupt Act, and if held, it would be taking property they could not in any way reach. This is an ingenious view of the question, but I think untenable. I think it is as much the duty of the court to protect the rights of the bankrupt as the creditors. If by the act he is entitled to certain exempt property, it is the duty of the court to see that he has it. When a bankrupt surrenders all his property to his creditors, except certain portions which the act exempts for his own use and the use and convenience of his family, it is the duty of the court to see that the portion he is entitled to is secured to him, as much as it is to see that the portion he is required to surrender to his creditors is surrendered to them.

This court proceeds under the bankrupt law only, and administers that, and has original jurisdiction as to all matters and things to be done under and by virtue of the bankruptcy. One of the things to be done under the act, is to assign and set off to the bankrupt, the exemptions mentioned in the 14th section. The bankrupt claims under that section this property that is

attached, and it is the duty of the court, if it is exempt by that act, to assign it to him as exempt property. No one will deny that it is exempt by the laws of this state, the domicile of the bankrupt, and being so it is unquestionably exempt by the 14th section of the Bankrupt Act.

Now can this court look into the laws of Illinois, to see whether it is exempt there or not? What has this court to do with the exemption laws of Illinois? I cannot see that it has anything. It must administer the Bankrupt Act and settle and determine the rights of the bankrupt and his creditors, under that act alone. If under that act, a creditor has a valid lien, or one that it recognises, then it will be sustained; and if that act does not recognize the lien then it cannot be sustained. It may be true that but for the bankruptcy proceedings, the attaching creditors could have held this property, and the same may be said of all attachments against bankrupts' estates that are dissolved by proceedings in bankruptcy.

After the commencement of proceedings in bankruptcy all proceedings by the creditors in the state courts against the bankrupt are forbidden, and all attachments issued within four months are, by the express terms of the act, declared to be dissolved without reference to the property upon which they are levied; the object of the act being to stop at once all proceedings against the bankrupt in any other court, and to bring all matters and questions between the bankrupt and his creditors into the bankrupt court for final settlement.

Now if this is so, how is the question as to whether this was exempt property material? The creditors' right to prosecute their attachment suits being taken away and their attachments being dissolved, what claim have they by virtue of the attachments to assert?

The District Court for the Eastern District of Missouri, in *In re Ellis*, 1 B. R. 154, has given a like construction to the act, and the District Court of South Carolina in *In re Hambright*, 2 B. R. 157, holds that the bankrupt is to be regarded as a *purchaser* of his exempt property, the consideration being the surrender of all his other property for the benefit of his creditors.

This view disposes of the motion of the creditors; but they insist that the officer should not be required to give up the property until his fees and charges upon it are paid, and there are some cases to the effect that he is entitled to his fees, but not I think

that he can refuse to deliver the property until they are paid. For if the attachments by virtue of which he holds the property are dissolved he has no means of enforcing his lien against the property. He cannot sell it. His remedy, if he has a lien, is to apply to this court to have it allowed and paid out of the assets that may come into the assignee's hands, and this court could on such an application make such an order as might appear just and equitable in the premises; but I do not think he can interpose his lien as against the right of the officers of this court to the possession, and withhold the property from them until it is paid.

Motion denied.

Supreme Court of Iowa.

MANDERSHIED v. CITY OF DUBUQUE.

Where an injury is the combined result of a defect in a highway and an accident which occurred without the fault of the plaintiff though it deprived him at the time of the injury of the power of exercising the usual care and prudence of a traveller, the plaintiff is not *in pari delicto* and may recover from the town.

Plaintiff averred that he was driving a sleigh and his horse becoming frightened and unmanageable without his fault, ran away, threw plaintiff out of the sleigh, and stepping into a hole in the highway, broke its leg. Held, that a good cause of action was set forth.

THIS was an action to recover damages on account of an injury to plaintiff's horse, by reason of a defective bridge, a part of a street of said city.

The petition alleged that plaintiff was driving his team of horses and sleigh through the streets of the city, when the horses became frightened and ran away, and without the fault of plaintiff became unmanageable, ran towards said bridge, and threw plaintiff out of the sleigh; and in crossing said bridge, one of the horses stepped through a hole, negligently permitted, &c., by defendant whereby its leg was broken, &c. The petition averred due care and diligence of plaintiff in driving his team, and that the defect in the bridge, whereby he sustained said loss, was in the travelled roadway, &c.

Defendant demurred to the petition, because it showed that the horses were beyond the control of plaintiff, and that he was not exercising due care in their management, at the time of the injury.

The demurrer was sustained, and plaintiff appealed.